Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

PRINCESS CRUISES, INC.

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit erred when it found severability only by re-writing the statute at issue because it was linguistically impossible to sever the concededly unconstitutional provision from the text of the statute?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding in the court below.

RULE 29.6 STATEMENT

Petitioner is a wholly owned subsidiary of The Peninsular and Oriental Steam Navigation Company, which is a publicly traded company listed on the London stock exchange.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Princess Cruises, Inc., respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. A, *infra*, 1a - 21a) is reported at 201 F.3d 1352 (Fed. Cir. 2000). The opinion of the United States Court of International Trade (App. B, *infra*, 22a - 31a), is reported at 15 F. Supp. 2nd 801 (Ct. Int'l Trade 1998).

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Harbor Maintenance and Revenue Act, 26 USC § 4461, are as follows:

(a) General rule. There is hereby imposed a tax on any port use.

* * *

(c) Liability and time of imposition of tax.

(1) Liability. The tax imposed by subsection (a) shall be paid by—

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) Time of imposition.

Except as provided by regulations, the tax imposed by subsection (a) shall be imposed—

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

26 U.S.C. § 4461.

The statutory definitions for section 4461 include the following:

(1) Port use. The term "port use" means—

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from, a commercial vessel at a port.

* * * * *

(3) Commercial cargo.

(A) In general.

The term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

26 U.S.C. § 4462(a).

STATEMENT OF THE CASE

Petitioner, Princess Cruises, Inc. ("Princess"), represents the operators of cruise ships that operate cruises around the globe. As pertinent to this case, ships in the Princess Cruises fleet either originate, terminate or make stopovers in several ports in the United States. Passengers on these cruises often disembark and go ashore for sightseeing or shopping. Since 1987, the U.S. Customs Service has imposed upon Princess certain taxes, known as HMTs ("harbor maintenance taxes"), under the Harbor Maintenance and Revenue Act ("HMRA"), 26 U.S.C. § 4461 *et seq*. Under that statute, HMTs are imposed on all cargo that passes through U.S. ports, and cargo is deemed to include cargo destined for export, cargo destined for import, and passengers.

The HMRA was enacted in 1986 "as a means of funding maintenance of the nation's seaports." App. A, *infra*, 4a. Under that act, HMTs had been assessed evenhandedly since 1987 on all exports, imports or passengers passing through ports that were covered by the HMRA until this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). In that case, the Court held that HMTs as imposed on exports are unconstitutional under the Export Clause of the Constitution, U.S. CONST. art. I, § 9, cl. 5. Because the decision in *United States Shoe* involved only the constitutionality of the imposition of HMTs on exports, that decision gave rise to—but did not resolve—the question whether the unconstitutional portion of the HMRA affecting exports could be severed from those portions of the HMRA that imposed HMTs on imports and passengers. In other words, would the Congress that

passed the HMRA and the President who signed that bill into law have done so if they had known that they were constitutionally disabled from imposing HMTs on exports?

Having been assessed HMTs that it believed to be improper on a number of grounds, Princess filed a protest with Customs on March 23, 1993 which was subsequently denied in part. Princess thereafter filed a summons and complaint in the Court of International Trade ("CIT"), App. B, *infra*, 25a. Both Princess and Customs moved for summary judgment. While those motions were *sub judice* in that court, this Court decided *United States v. United States Shoe Corp.*, *supra*.

A. The Decision of the Court of International Trade

Applying *United States Shoe* to the case before it, the CIT first engaged in a careful analysis of the language of the HMRA and concluded that the plain language of the HMRA equated passengers with cargo. The court's reasoning was straight forward:

(1) Under the HMRA, "[t]here is hereby imposed a tax on any port use." App. B, *infra*, 28a (quoting 26 U.S.C. § 4461(a)); (2) the HMRA defines "port use" as "(A) the loading of commercial cargo on, or (B) the unloading of commercial cargo from, a commercial vessel at port"; *id.*; and (3), "[t]he term 'commercial cargo' is defined as 'any cargo transported on a commercial vessel, including passengers transported for compensation or hire.'" *Id.* (quoting 26 U.S.C. § 4462(a)(3)(A)). According to the CIT, the words "embark, board and load [as used in the HMRA] all refer to the initial activity of passenger movement from port onto the vessel." App. B, *infra*, 30a. In other

words, the plain language of the HMRA only imposed HMTs on passengers because the term "passengers" was defined in the statute as "cargo," Congress having moved from the general to the specific as a means of making clear its purpose to treat "passengers" as "cargo" for purposes of imposing HMTs on passengers.

Having concluded that Congress had equated export cargo with passengers and import cargo for purposes of the imposition of HMTs, the CIT concluded that HMTs could not be imposed on passengers because this Court had held that HMTs could not be imposed on export cargo. In short, the CIT determined that the language of the HMRA compelled the conclusion that Congress intended passengers (and import cargo) to be taxed on the same basis as export cargo.

B. The Decision of the Federal Circuit

The Government appealed the judgment of the CIT to the Federal Circuit. That court had on its docket another case, *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361 (Fed. Cir. 2000), in which the same issue had been raised. On January 5, 2000, the Federal Circuit handed down its opinions in both cases in which it reversed the CIT's judgments. In its opinion issued in this case, the Federal Circuit noted that the question now presented here by Princess was identical to one of the questions presented in the *Carnival* case and that because this question was being resolved in *Carnival* in a full opinion, it would not be "revisited" in the opinion issued in this case. App. A, *infra*, 11a.

In its opinion in *Carnival*, the Federal Circuit drew primarily on this Court's decision in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). Acknowledging that

this Court has historically utilized "various formulations of the appropriate test for deciding" whether an unconstitutional provision of a statute is severable from the constitutionally valid portions of the same enactment, that court, quoting from *Alaska Airlines*, stated that the "more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress . . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." 200 F.3d at 1367, *Carnival* Pet. App., 11a.[1]

Having adopted this "test" of severability, the Federal Circuit then engaged in a broad-ranging analysis of the legislative history, concluding that "the legislative history of the statute does not show that Congress would not have imposed the Harbor Tax without applying it to exports." *Id.* at 1367, *Carnival* Pet. App., 13a. Having so concluded, the Federal Circuit went on to consider and reject Carnival's other arguments and ruled against Carnival.

REASONS FOR GRANTING THE WRIT

This case presents the same questions at issue in *Carnival Cruise Lines, Inc. v. United States*, *supra*, in

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1/ The Federal Circuit's opinion in *Carnival* is reprinted in Carnival's petition for a writ of certiorari that is being filed in this Court by Carnival contemporaneously with this petition. For the convenience of the Court, citations herein to the *Carnival* decision below will include a parallel citation to the Appendix to Carnival's Petition.

which, as noted above, Carnival is expected to file a petition for a writ of certiorari in this Court contemporaneously with this petition. Princess hereby adopts the Questions Presented and reasons for granting the writ set forth in Carnival's petition. In the instant petition, however, Princess has formulated a question that is at least arguably not within the ambit of the questions presented by Carnival in its petition.

In its decision in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), this Court placed a formidable limit on what it termed "textual surgery" that could be performed by courts faced with the necessity of determining whether an unconstitutional provision of a statute is severable from the otherwise constitutional provisions of that same statute. In *Reno*, the Court was presented with a situation in which the federal statute involved prohibited speech or images that are "obscene or indecent." *Id.* at 883. The Court concluded that the term "indecent" was unconstitutionally vague and therefore unenforceable, but that the term "obscene" was constitutional as a description of speech or conduct that could be prohibited by statute notwithstanding the First Amendment. In so concluding, this Court pointed out that "the restriction of 'obscene' material enjoys a textual manifestation separate from that for 'indecent' material . . . ." *Id.* at 883. In *Reno*, the Court reiterated a point thoroughly ignored by the Federal Circuit in these cases: "A severability clause requires textual provisions that can be severed." *Id.* at 882.

In this case and *Carnival*, the Federal Circuit did not identify the provision of the HMRA that could be severed as unconstitutional from the remainder of that

statute because there is none. Certainly 26 U.S.C. § 4461(3)(A), which expressly equates passengers with "commercial cargo," cannot be severed, because if that provision is severed, then there is no statutory basis upon which to impose HMTs on passengers. Indeed, the result reached by the Federal Circuit is totally contrary to the relevant text of the HMRA because when Congress included "passengers" within the reach of HMTs in 26 U.S.C. § 4462(a)(3)(A), it also enacted—in the very next subparagraph, 26 U.S.C. § 4462(a)(3)(B) - a list of "Certain items not included," but that list did not exclude exports. In addition, it is linguistically impossible to sever exports from the definition of "port use" found in 26 U.S.C. § 4462(a), but under the "General rule," a tax is imposed "on *any* port use." (emphasis added) Thus, there is no provision to sever; instead, the Federal Circuit had to re-draft the law Congress enacted by implicitly adding exported goods to Congress' itemized list of exclusions from HMTs. As the *Reno* Court reiterated, "[t]his Court 'will not rewrite a . . .' law to conform it to constitutional requirements." *Id.* at 884-85 (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). The ease with which the court below rewrote the pertinent statute to exclude exports in the face of the definitions Congress had given to its own words amplifies the need for this Court's intervention in this case as articulated by Carnival in its petition. If the Federal Circuit's decisions in these two cases are allowed to stand, the lower courts will justifiably conclude that they are as free as the Federal Circuit believes itself to be to re-write statutes tainted by unconstitutionality and to make the policy judgments that, in our system, are within the exclusive province of the political Branches.

CONCLUSION

The petition for a writ of certiorari should be considered along with the petition filed by Carnival and should either be held or granted and consolidated with a grant of Carnival's petition.

Respectfully submitted.

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April 4, 2000

APPENDIX

APPENDIX A

United States Court of Appeals
for the Federal Circuit

99-1014

PRINCESS CRUISES, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Judith A. Lee, Gibson, Dunn & Crutcher LLP, of Washington, DC, argued for plaintiff-appellee. Of counsel on the brief was Lisa A. Murray, Gibson, Dunn & Crutcher LLP.

Todd M. Hughes, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were David W. Ogden, Acting Assistant Attorney General, and David M. Cohen, Director. Of counsel on the brief was Richard McManus, Attorney, Office of the Chief Counsel, United States Customs Service, of Washington, DC.

J. Kevin Horgan, DeKieffer & Horgan, of Washington, DC, for amicus curiae Thomson Consumer Electronics, Inc.

Lawrence M. Friedman, Barnes, Richardson & Colburn, of Chicago, Illinois, for amicus curiae Amoco Oil Company.

Appealed from: United States Court of International Trade

Senior Judge R. Kenton Musgrave

United States Court of Appeals
for the Federal Circuit

99-1014

PRINCESS CRUISES, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

REISSUED: January 5, 2000

Before MICHEL, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and BRYSON, Circuit Judge.

MICHEL, Circuit Judge.

The United States appeals the summary judgment of the United States Court of International Trade, holding that the Harbor Maintenance Tax ("HMT"), 26 U.S.C. § 4461 (1994), is unconstitutional as applied to commercial passengers on cruise ships and that the Arriving Passenger Fee ("APF"), 19 U.S.C. § 58c(a)(5) (1994 & Supp. III 1997), was improperly assessed on certain of the appellee's cruises. See Princess Cruises v. United States, 15 F. Supp. 2d 801 (Ct. Int'l Trade 1998). Princess Cruises ("Princess") contested Customs's assessment of the HMT on cruises with "stopovers" or "layovers" in HMT-covered ports if the originating and terminating ports of the cruise were HMT-exempt. In addition, the cruise line challenged the inclusion of the full cost of the passenger ticket in the calculation of the

HMT.[1] Princess also challenged the collection of APFs on cruises that originate in or arrive directly from an APF-exempt port. The Court of International Trade held that the HMT was unconstitutional and did not reach the issue of the application of the tax to layovers or stopovers, nor the issue of valuation of the cruise for purposes of calculating the HMT. The Court of International Trade also held that APF liability could only be determined based on the beginning and ending ports of a cruise, without regard to portions of the journey made on other modes of transportation, e.g., air travel. The Court of International Trade went on to hold that the APF was not due for passengers on cruises that begin in an exempt port and arrive directly in the United States, or begin in the United States and "arrive temporarily or end in [exempt ports]." This appeal was submitted for our decision following oral argument on October 5, 1999.

Because we hold that the HMT, as applied to passenger liners, is not unconstitutional and is severable from the unconstitutional application of the tax to exports, we reverse the decision of the Court of International Trade as to the constitutionality of the HMT. In addition, we hold that the HMT is properly assessed on stopovers or layovers at non-exempt ports, regardless of the origination or ultimate destination of the cruise. As to the APF, we hold that the Customs Service's interpre-

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[1] The HMT is an ad valorem tax. It is calculated as a percentage of the value of the passenger ticket, or in the case of cargo, on the value of the cargo. Princess originally challenged the calculation of the HMT over the full price of the ticket, arguing that the HMT should not be calculated based on the non-transportation portions of the ticket, such as food. The trial court's opinion did not address this issue, and it is not raised in the briefs on appeal. Therefore, this court does not reach the issue.

tation of "journey" to include multiple stops and multiple forms of transportation, is not unreasonable, and therefore reverse the Court of International Trade's decision. We thus remand for a determination of Princess's HMT and APF liability that is consistent with this opinion.

BACKGROUND

Princess operates cruises around the world. The Princess voyages of particular relevance to this appeal, however, are the "Transcanal" cruises and the "Vancouver/Wittier" cruises. The Transcanal route begins in either Acapulco, Mexico, or San Juan, Puerto Rico, traverses the Panama Canal, makes various other stops in Central or South America and terminates in either San Juan or Acapulco. The Vancouver/Wittier route begins in either Vancouver, Canada, or Wittier, Alaska,[2] makes brief stopovers during which passengers may leave the ship in ports that are subject to the HMT, such as Ketchikan, Alaska, and terminates in either Wittier or Vancouver. Passengers usually arrive from the United States at the port of cruise departure and return to the United States from the terminal port of the cruise by air. In some cases, the air and ship travel are sold as a package.

The HMT was enacted in 1986 as part of the Water Resources Development Act ("WRDA"), Pub. L. No. 99-622, § 1402(a), 100 Stat. 4082, 4266, as a means of funding maintenance of the nation's seaports. The tax operates by imposing a user-fee on commercial vessels using the ports. The statute directs that the tax be assessed on importers, exporters, domestic shippers and commercial passenger transport (except ferries). See 26

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[2] Despite being in the U.S., Wittier is not covered by the HMT. See 19 C.F.R. § 24.24(b)(1).

U.S.C. § 4461, 4462 (1994 & Supp. III 1997).[3] The revenues from the HMT are used to fund WRDA pro-

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[3] The relevant text of the statute is as follows:

§ 4461. Imposition of Tax.
(a) General Rule.–There is hereby imposed a tax on any port use.
(b) Amount of Tax.–the amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.04 percent of the value of the commercial cargo involved.
(c) Liability and Time of Imposition of Tax.–
(1) Liability.–The tax imposed by subsection (a) shall be paid by–
(A) in the case of cargo entering the United States, the importer,
(B) in the case of cargo to be exported from the United States, the exporter, or
(C) in any other case, the shipper.
(2) Time of Imposition. – Except as provided by regulations, the tax imposed by subsection (a) shall be imposed –
(A) in the case of cargo to be exported from the United States, at the time of loading, and
(B) in any other case, at the time of unloading.

§ 4462. Definitions and Special Rules.
(a) Definitions. – For purposes of this subchapter –
. . . .
(3) Commercial cargo. –
(A) In General. – the term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.
. . . .
(4) Commercial vessel. –
. . . .
(B) Exclusion of ferries. –

[Footnote continued on next page]

jects such as the dredging of harbors. Since the imposition of the HMT in 1987, Customs has been assessing the tax for all passengers aboard cruises that originate, layover or terminate in an HMT-covered port. Customs issued a regulation imposing this requirement in 1987. See 52 Fed. Reg. 10198, 10202 (1987) (interim regulations); 19 C.F.R. § 24.24 (1999).[4]

The APF is a fee imposed for the "provision of customs services" on the arrival of passengers aboard commercial vessels or aircraft from a place outside the United States. See 19 U.S.C. § 58c(a)(5). The APF was part of the Consolidated Omnibus Budget Reconciliation

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[Footnote continued from previous page]

> (i) In general. – the term "commercial vessel" does not include any ferry engaged primarily in the ferrying of passengers (including their vehicles) between points within the United States, or between the United States and contiguous countries.

Pub. L. No. 99-662, § 1402(a), 100 Stat. 4082, 4266 (codified as amended at 26 U.S.C. §§ 4461, 4462).

[4] The relevant portion of the regulation follows:

> (3) Passengers
>
> (i) Time and place of liability. Subject to the exemptions and special rules of this section, when a passenger boards or disembarks a commercial vessel at a port within the definition of this section, the operator of that vessel is liable for the payment of the port use fee. The fee is to be based upon the value of the actual charge for transportation paid by the passenger or on the prevailing charge for comparable service if no actual charge is paid. The vessel operator on each cruise is liable only once for the port use fee for each passenger.

19 C.F.R. § 24.24(e)(3)(i) (emphasis added).

Act of 1985 ("COBRA"), Pub. L. No. 99-272, § 13031, 100 Stat. 82, 308 (1986). The statute exempts from the APF passengers whose journey "originated" in Canada, Mexico, a territory of the U.S. or an adjacent island. Passengers whose journey originated in the U.S. and was limited to the above locations are also exempt.[5]

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[5] The text of the statute follows:

(a) Schedule of fees

In addition to any other fee authorized by law, the Secretary of the Treasury shall charge and collect the following fees for the provision of customs services in connection with the following:

. . . .

(5) For the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside the United States (other than a place referred to in subsection (b)(1)(A) of this section), $5.

(b) Limitations on fees

(1) No fee may be charged under subsection (a) of this section for customs provided in connection with –

(A) the arrival of any passenger whose journey –

(i) originated in –

(I) Canada

(II) Mexico

(III) a territory or possession of the United States, or

(IV) any adjacent island (within the meaning of section 1101(b)(5) of Title 8), or

(ii) originated in the United States and was limited to –

(I) Canada,

(II) Mexico,

(III) territories or possessions of the United States, and

(IV) such adjacent islands;

[Footnote continued on next page]

Customs defines the place where a journey "originated," for the purposes of the APF, as "the location where the person's travel begins under cover of a transaction which includes the issuance of a ticket or travel document for transportation into the customs territory of the United States." 19 C.F.R. § 24.22(g)(2)(i)(B).[6] The regulation specifically recognizes that a "journey ... may encompass multiple destinations and more than one mode of transportation." Id. Based on this regulation Customs would, for example, assess the fee on a passenger who flew from the continental United States to Puerto Rico, boarded a cruise ship, traveled to a non-exempt port, terminated the cruise in Mexico and returned by air to the United States.

After an audit of Princess's HMT and APF collections and remittances, Customs issued bills to Princess in 1992 for underpayment of those fees. Princess filed a protest challenging the assessment of the fees on March 23, 1993. On December 22, 1993, Customs denied the protest in part. Princess then filed a complaint with the Court of International Trade.

On cross motions for summary judgment, the trial court issued an opinion in 1998 holding that the application of the HMT to transportation services was unconstitutional in light of the Supreme Court decision in United States v. U.S. Shoe, 118 S. Ct. 1290 (1998) (holding that the application of the HMT to exports was a violation of

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[Footnote continued from previous page]

19 U.S.C. § 58c (a)(5), (b)(1) (1988).

[6] This interpretation was not promulgated as a regulation until 1993. See 58 Fed. Reg. 54,271, 58,284 1993). Neither party disputes, however, that during the relevant period covered by the Customs audit (1986-1991) Customs applied an interpretation of the statute that defined journey identically to the definition later described in the regulation.

the export clause of the Constitution). Because it found the statute to be unconstitutional, the trial court did not reach the issue of the applicability of the HMT to stopovers or layovers, or the issue of proper valuation of the cruise for purposes of calculating the HMT. See Princess Cruises, Inc., 15 F. Supp. 2d at 803.

The Court of International Trade also held that that the term "journey" in the APF statute referred to "travel from origination to termination of the cruise" and that "layover stops did not affect the administration of the APF statute." Id. Thus, under the Court of International Trade's holding, a passenger on a cruise originating in an APF-covered port and terminating in the United States would be subject to the APF. A passenger on a cruise originating in an APF-exempt port, such as Acapulco, and terminating in the United States would not be subject to the APF, regardless of any layovers in APF-covered ports. Likewise, a passenger on a cruise originating in a covered port and terminating in the United States would be subject to the fee, even if the last stop prior to arrival in the United States was an exempt port. Under the Court of International Trade's holding, air travel by the passenger would not be a factor in determining APF liability. The United States appealed.

We have jurisdiction over this appeal under 28 U.S.C. § 1295(a)(5).

DISCUSSION

The United States seeks a reversal of the Court of International Trade's decision that the HMT is unconstitutional as applied to passenger transport and that passengers on Princess cruises that originate and terminate in APF-exempt ports are exempt from the APF. Princess seeks to have the Court of International Trade decision affirmed on the grounds that the application of the HMT to passenger transport is not severable from its unconstitutional application to exports, or, in the alternative, on the statutory interpretation grounds originally

argued before the Court of International Trade. We review the determination of the constitutionality of the HMT de novo. See Medline Indus., Inc. v. United States, 62 F.3d 1407, 1409 (Fed. Cir. 1995). Statutory interpretation by the Court of International Trade, including the question of severability, is also reviewed de novo. See id.; cf. Alaska Airlines v. Donovan, 766 F.2d 1550, 1555 (D.C. Cir. 1985) (finding that severability "reduces to a matter of statutory interpretation"). Like the Court of International Trade, this court is required to give deference to Customs Service regulations interpreting portions of the statute that are ambiguous. See United States v. Haggar Apparel Co., 119 S. Ct. 1392, 1398-1400 (1999) (requiring deference to Customs regulations); Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).[7]

I. Constitutionality of the HMT

We hold that the application of the HMT to passenger transport is not a violation of the export clause of the United States Constitution. In addition, we hold that the unconstitutional application of the HMT to exports is severable from the rest of the statute and its applications. Because the issues of constitutionality and severability raised in this appeal are identical to those addressed by

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[7] We have no doubt that Congress, implicitly, has granted to Customs at least some authority to engage in substantive rulemaking with respect to the subject matter of both the HMT and the APF statutes that are at issue in this case. Cf. Merck & Co. v. Kessler, 80 F.3d 1543, 1549-50 (Fed. Cir. 1996) (holding that deference was owed to "statutory interpretations by agencies with [substantive] rulemaking power."). Thus, the substantive regulations promulgated and applied here by Customs are entitled to Chevron deference just as surely as the substantive Customs regulations in Haggar.

this court in United States v. Carnival Cruise Lines, Inc., Appeal No. 98-1536, ___ F.3d ___ (Fed. Cir. 1999), we do not revisit that discussion here.

II. Application of the HMT to Stopovers or Layovers

Princess argues in the alternative, even if the HMT is constitutional, it cannot be assessed on stopovers or layovers by cruise ships in HMT-covered ports if the cruise originates or terminates in an HMT-exempt port. Despite the failure of the trial judge to address this issue in his opinion, Princess argues that this court may affirm the judgment concerning the HMT on the basis of the findings of fact and conclusions of law announced from the bench following the parties' oral arguments before the Court of International Trade.

A party may defend a judgment "on any ground properly raised below." Consolidated Aluminum Corp. v. Foseco Int'l, Ltd., 910 F.2d 804, 814 (Fed. Cir. 1990) (quoting Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979)). The proper interpretation of the HMT statute was fully briefed and argued by Princess and the government before both this court and the Court of International Trade. Thus, having found that the application of the HMT to passenger transport is not contrary to the Constitution, in the interest of efficiency we now address the question of the proper interpretation of the HMT statutory language and the accompanying regulations.

Princess argues that the HMT should only be applied to cruises beginning or terminating in HMT-covered ports, while a stopover or layover in an HMT-covered port should not trigger liability.[8] In support of

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[8] The cruise line is liable for the HMT only once for each passenger on a given cruise. See 26 U.S.C. § 4462(g)(1); 19 C.F.R. § 24.24(3)(i) (1999). Thus, even if the cruise began

[Footnote continued on next page]

its position, Princess alleges that the Customs regulations dictate that it should only be applied at the beginning and end of a cruise voyage. The specific regulations at issue provide that the tax is due "when a passenger boards or disembarks a commercial vessel at a port within the definition of this section." 19 C.F.R. § 24.24(e)(4) (1999). Princess argues that since the definitions of board and disembark are not provided in the statute or the regulation, the court must turn to unrelated Customs regulations for the definition of those words.

Although "board" is not defined anywhere in the Customs regulations, the terms "embark" and "disembark" are defined in a Customs Service regulation as follows:

> [e]mbark means a passenger boarding a vessel for the duration of a specific voyage and disembark means a passenger leaving a vessel at a conclusion of a specific voyage. The terms embark and disembark are not applicable to a passenger going ashore temporarily at a coastwise port who reboards the vessel and departs with it on sailing from the port.

19 C.F.R. § 4.80a(a)(4) (1999) (emphasis added). This regulation governs the transportation of passengers between U.S. ports on vessels that are not American-built, owned and documented. See 46 U.S.C app. § 289

[Footnote continued from previous page]
and ended in an HMT-covered port and stopped in multiple HMT-covered ports the cruise line would only be liable for one HMT payment. Thus liability for stopovers or layovers does not trigger additional liability, except in the case where the beginning and ending point of the cruise are exempt ports.

(1994). It is addressing a different question, and while it may be instructive, it is not binding on Customs with respect to the HMT. Thus this court must look to the language of the statute, the intent of Congress as indicated by the legislative history, and the interpretation given by Customs to its own regulation in determining whether the HMT applies to stopovers and layovers.

Where the intent of Congress on a particular question is clear, the courts and the agency "must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 843. In determining what was the intent of Congress, the court may look to the legislative history of the statute. See id. at 845.

In this case the language of the statute is not clear and unambiguous about whether the HMT is to be imposed on stopovers or layovers at HMT-covered ports. Nevertheless, the intent of Congress is illuminated by the legislative history of the HMT and subsequent taxes. Reports from the various congressional committees developing the HMT reveal that Congress was particularly concerned with enacting an equitable tax that applied to all port users. For example, the House Ways and Means Committee described the HMT as a "uniform excise tax paid by the principal beneficiaries of Federal port development and maintenance costs." H.R. Rep. No. 99-251, pt. III at 9 (1985). Furthermore, in 1989 in considering an international departure tax on ship passengers as part of the Budget Reconciliation Act, Pub. L. No. 101-239, Congress found that

> [u]nder special rules, no harbor maintenance tax applies to cruise ships loading or unloading with respect to cruises to or from Alaska, Hawaii, or a U.S. Possession, unless the Alaska, Hawaii, or U.S. Possession port is only a stopover to a foreign destination.

H.R. Conf. Rep. No. 101-386, at 602 (1989) (emphasis added), reprinted in 1989 U.S.C.C.A.N. 3018, 3205; see also Senate Fin. Comm. Explanation of Revenue Reconciliation Act of 1989, 135 Cong. Rec. 24,236, 24,359 (1989) (containing the same language). While the above language deals specifically with stopovers as an exception to the special HMT rules for Alaska and Hawaii[9] it implies that in considering subsequent taxes Congress believed that the HMT applied to stopovers. While this legislative history provides some indication that Congress intended for the HMT to apply when a cruise ship made a stopover or layover in an HMT-covered port, it is not sufficient evidence to indicate an "unambiguous intent" as required by Chevron. Thus we must now analyze the Customs interpretation under the second prong of the Chevron test.

Although this court and the Court of International Trade traditionally did not accord Chevron deference to Customs Service regulations interpreting statutes, the Supreme Court recently held that the courts must apply Chevron deference to Customs interpretations in a published regulation. See Haggar, 119 S. Ct. at 1400 ("Like other courts, the Court of International Trade must, when appropriate, give regulations Chevron deference."). Thus, if the "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843.

Here, unfortunately, the regulation itself is ambiguous, so the court is forced to rely on Customs's interpre-

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[9] Cargo being transported to or from Alaskan and Hawaiian ports was made exempt from the HMT to avoid imposing an undue burden on those states, which rely heavily on shipping for basic necessities. See 26 U.S.C. § 4462(b)(B), (C); 52 Fed. Reg. 10198, 10199 (1987).

tation of its own regulation. If the court must now accord Chevron deference to Customs regulations interpreting statutes, we must accord at least as much deference to that agency's interpretation of its own regulations. Accordingly, we will defer to the Customs interpretation unless it is unreasonable.

The government argues that Customs's interpretation of its own regulations to define "board" and "disembark" to include stopovers or layovers is not unreasonable and comports with the intent of Congress to impose a fee based on port usage and the language of the statute, which does not explicitly exclude stopovers or layovers but does exclude other port uses, such as ferries. We agree.

In light of the clear intent of Congress to impose a fee on all port use as revealed in the legislative history, the Customs interpretation including stopovers and layovers in the port use covered by the HMT is not unreasonable. The HMT is intended to charge those using the ports for the expense of maintaining the ports. It is not apparent to us that the use of the port to discharge passengers for shopping and sight-seeing in a port and then reboard those same passengers is any less of a use or has any less impact on the port than boarding or discharging passengers at the beginning or end of a cruise.

In addition to its argument that the Customs regulation is contrary to the statutory language, Princess also argues that Customs initially informed the company that the HMT would not apply to the layovers or stopovers and thus could not later decide to apply the tax to those port uses. According to Princess, the Regional Director of the Regulatory Audit Division advised the company in a fax that the Office of Regulations and Rulings had determined that the HMT did not apply to stopovers and layovers. The fax stated that 19 C.F.R. § 4.80a(a)(4) (discussed above) applied to Princess and no HMT was due for the stopovers. The government points out, however, that this was not a formal "letter ruling" or adjudi-

cation by Customs because such a letter must issue from Headquarters or the appropriate office of Customs. In this case the appropriate office was the International Trade Compliance Division or the Office of Regulations and Rulings, not the Pacific Regional Office.

It is well settled that a party cannot claim estoppel against the government based on the actions of an agency employee. Since the fax that Princess relies on could not have been a formal letter ruling or adjudication upon which it was entitled to rely, we reject Princess's estoppel arguments.

Consequently, we hold: 1) the application of the HMT to passenger transport is constitutional; and 2) Customs Service's interpretation of the statute to apply the HMT to layovers or stopovers in HMT-covered ports, even when the beginning and ending points of the cruise are in foreign countries or HMT-exempt ports, is reasonable. Therefore, we reverse the decision of the Court of International Trade and remand for a determination of Princess's HMT liability that is consistent with this decision.

III. The Arriving Passenger Fee

With regard to the APF, Princess argues that the statute should be interpreted to mean that a "journey" includes only the cruise travel and thus the journey "originates" where the cruise begins and not where the passenger first departed from the United States on a plane. Customs, however, has interpreted "journey," under the statute, to include all stages of an itinerary, even in those circumstances where travel is on different modes of transportation and covers multiple destinations. See 19 C.F.R. § 24.22(g)(2)(i)(B).

As discussed above, the Supreme Court's decision in Haggar makes clear that a Customs regulation interpreting a statute is entitled to Chevron deference. See 119 S. Ct. at 1400. That deference is not affected by the fact that Customs promulgated the regulation formaliz-

ing its interpretation of the statute subsequent to imposing the APF on Princess pursuant to that interpretation. See Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 739-41 (1996) (holding that neither an agency's delay in promulgating a regulation nor the fact that "it was litigation which disclosed the need for the regulation" affects the court's deference to the agency's interpretation of an ambiguous statute as embodied in such regulations). Thus we will apply the traditional two-step Chevron analysis to the APF statute and its interpretation by the Customs Service.

Princess contends that even with Chevron deference Customs's interpretation must fail because it is at odds with the statute, exceeds the congressional delegation of authority and is unreasonable, arbitrary and capricious. First Princess argues that the intent of Congress was clear and unambiguous with regard to the meaning of journey. We reject this argument, however, because the statute clearly does not provide any definition of the term "journey."

Princess next argues that Congress did not grant Customs broad power to promulgate substantive regulations when it passed the COBRA, but rather gave Customs the limited role of administering the APF. The legislative history reveals concern in Congress that Customs not use the APF to exact additional fees for other services or to increase the paper-work burden imposed on industry. It does not reveal, however, any specific definition of journey or concern that application of the APF to passengers making layover stops in APF-covered ports would be an imposition of "additional fees" or a greater paper-work burden. Accordingly, we hold that defining journey to include multiple stops or more than one mode of transportation was not outside the scope of the authority granted to Customs by Congress.

Princess argues that the Customs interpretation is arbitrary and capricious because such interpretation un-

fairly subjects Princess to APF liability based on decisions made by passengers regarding air travel which are out of Princess's control. To support its argument Princess quotes from the Customs ruling denying its protest in which Customs declares that a travel agent issuing a plane ticket and a cruise ticket would be liable for the APF, whereas neither the travel agent nor the cruise operator would be liable if each issued the same tickets independently. Princess poses other hypotheticals with equally anomalous results, such as a passenger arriving for a cruise from overseas or a passenger who makes a trip abroad before traveling to a U.S. departure port.

It is not clear, however, that any of the scenarios presented by Princess are currently at issue. Customs asserts that its interpretation only applies to those situations where Princess sells a cruise package or otherwise coordinates an itinerary such that Princess would be aware of the journey's beginning and ending points. In fact, the government argues the hypotheticals are just that, as none have actually been imposed on Princess nor would the APF be imposed on Princess in situations where it was unreasonable to do so. We therefore refuse to hold Customs's interpretation of the statute to be unreasonable merely because the Appellee can conjure a hypothetical situation in which that interpretation would produce unreasonable results. Rather we hold that the Customs interpretation, imposing liability for the fee on the party issuing the travel documents, or in the case of foreign-issued tickets, on the carrier transporting the passenger out of the United States customs territory, avoids the record-keeping difficulties hypothesized by Princess, because the responsible entity necessarily knows the entire itinerary of the passenger traveling on that set of travel documents.

Finally, Princess argues that the plain language of the statute exempts from the APF any passenger whose last port of call before arriving in the U.S. was an exempt port, regardless of non-exempt locations visited

prior to the exempt port. This interpretation directly conflicts with the language of the statute, and thus we reject it.

The statute exempts trips that "originated in the United States and [were] limited to" Canada, Mexico, a territory, possession or an adjacent island. 19 U.S.C. § 58c(b)(1)(A)(i)(II) (emphasis added). If the interpretation offered by Princess were allowed to stand, the exemption in the statute for trips originating in the U.S. would become superfluous. If all APF liability was dependent only on the last stop before entering a U.S. port, Congress would not have needed to create an exemption for those trips originating in the U.S. and stopping only at exempt ports, since those trips, by definition, would already be excluded from APF liability by the other exemptions. It is a long-held tenet of statutory interpretation that one section of a law should not be interpreted so as to render another section meaningless. Accordingly, we hold that the exemption depends on where the journey "originated," not on the last port of call before entering the United States.

For similar reasons, we reject the lower court's holding that "layover stops at APF-covered ports do not, in and of themselves, trigger APF liability." Princess Cruises, Inc. 15 F. Supp. 2d at 804. The statute is clear, when a journey begins and ends in the United States, the journey is only exempt from the APF if the entire journey is "limited to" Canada, Mexico, U.S. territories or possessions, or the adjacent islands. 19 U.S.C. § 58c(b)(1)(A)(i)(II). Thus, any journey beginning and ending in the U.S., including journeys involving both airline and cruise ship travel, as described above, will be subject to APF liability if any stop on the itinerary was in a non-exempt port. However, because it is the place of origin that determines liability, if the journey "originated" in one of the exempt ports, such as Puerto Rico, then a stopover or layover in a non-exempt port will not

trigger liability even if the traveler enters the United States at the end of the journey.

In addition to the arguments addressed above, Princess also asserted at oral argument before this court that it did not issue any tickets, but rather that all tickets were issued by independent travel agents. Thus, Princess claimed it should not be subject to APF liability even if the Customs interpretation of the word journey is found to be reasonable, because the regulation requires that the APF be paid by the entity issuing the ticket. The trial court made no findings regarding whether or not Princess issued some or all of the tickets in question. Also not briefed or fully argued before this court is the question of whether Princess as a principal would be liable for the APF on tickets distributed by designated travel agents acting on its behalf. This court is without any evidence upon which to make a determination regarding whether Princess, or another party, is liable for the APF on the tickets in question. In addition to the question of which party is responsible for collection of the APF on the tickets, a number of other factual questions must be answered before a final determination of liability can be made. Those factual findings must be made by the trial court on remand.

Because we hold that the Customs Service's interpretation of the APF statute is not unreasonable, we reverse the lower court's holding that APF liability depends only upon the points of origination and termination of the cruise. We further reverse the holding that layovers and stopovers do not trigger APF liability, and hold that APF liability attaches when a passenger whose journey originates in the United States has a layover or stopover in any non-exempt port. Consequently, we remand this case to the Court of International Trade for a determination of Princess's APF liability that is consistent with this decision.

CONCLUSION

The judgment of the Court of International Trade is REVERSED and the case is REMANDED.

COSTS

Each party to bear its own costs.

APPENDIX B

PRINCESS CRUISES, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Court No. 94-06-00352

UNITED STATES COURT OF INTERNATIONAL TRADE

June 9, 1998, Dated

COUNSEL:

Judith A. Lee, Gibson, Dunn & Crutcher LLP, for plaintiff.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, United States Department of Justice, A. David Lafer and John K. Lapiana, for defendant.

JUDGES:

R. KENTON MUSGRAVE, SENIOR JUDGE.

OPINION BY:

R. KENTON MUSGRAVE

OPINION:

OPINION

In *U.S. Shoe Corp. v. United States,* 19 C.I.T. 1284, 907 F. Supp. 408 (1995) ("U.S. Shoe"), this Court held that the Harbor Maintenance Tax ("HMT") was unconstitutional as applied to exports. The decision was af-

firmed by the Court of Appeals for the Federal Circuit ("CAFC"), *U.S. Shoe Corp. v. United States,* 15 Fed. Cir. (T) , 114 F.3d 1564 (1997), and, finally, by the United States Supreme Court, *United States v. U.S. Shoe Corp.*, 140 L. Ed. 2d 453, 118 S. Ct. 1290 (1998). Not explored, however, was the question of whether the constitutionally flawed statute applied to charges imposed upon shippers for the transportation of passengers.

Plaintiff, Princess Cruises, Inc. ("Princess"), brought this action to contest the assessment and collection of arriving passenger fees ("APFs") and Harbor Maintenance Tax fees ("HMT fees") on passenger cruises by defendant, the United States Customs Service ("Customs"). Princess contends that cruises that originate or arrive directly from an APF-exempt port should not be assessed APFs. Princess also challenges the assessment of HMT fees on cruises originating and terminating in HMT-exempt ports, even when the cruise makes layover stops at HMT-covered ports. Finally, Princess contests the calculated value of the cruise upon which the HMT fees were based. The Court finds that the APF does not attach to passengers whose cruise originates and terminates in an APF-exempted port. Further, the Court finds that the HMT may not be imposed on the value of transportation services provided to cruise passengers.

Background

Princess is a wholly-owned indirect subsidiary of the Peninsular and Oriental Steam Navigation Company. Princess operates cruise ships around the world. At issue in this case are two Princess voyages known as the "Transcanal" and "Vancouver/Whittier" cruises. The Transcanal cruise journeys between Puerto Rico and Acapulco, traveling through the Panama Canal, and visits a number of ports in the Caribbean and South America. The Vancouver/Whittier cruise also travels between two ports, Vancouver, British Columbia and Whittier, Alaska and also stops at various ports en route. On both cruise routes, passengers board the cruise in either of the

ports of origination and are assigned state rooms where they maintain a temporary residence until the termination port where passengers disembark. At the layover ports, some passengers temporarily go ashore for sightseeing or shopping while other passengers choose to remain aboard the ship.

Since the imposition of the HMT in 1987, Customs has been assessing and collecting the fees for all passengers aboard cruises that originate, layover and terminate in HMT-covered ports. In March 1991, Customs' Regulatory Audit Division ("RAD") began an audit of Princess' collection and remittance of APFs and shortly thereafter, began an audit of Princess' collection and remittance of HMT fees. Customs' APF audit examined the time period from July, 1986 through December, 1991 and the HMT audit examined the time period from 1987 through 1991. The APF audit was concluded in July, 1992 and the HMT audit was completed in May, 1992. As a result of the audits, Customs issued two bills to Princess for alleged underpayment of APFs and HMT fees. On March 23, 1993, Princess filed a protest challenging the assessment of both the APFs and the HMT fees and the associated interest charges. Princess also contends that Customs assessed the HMT based on an overvalued transportation charge. Customs denied Princess' protest in part on December 22, 1993 and Princess filed a summons and complaint with the Court under *28* U.S.C. § 1581(a).

Standard of Review

Under 28 U.S.C. § 2639(a)(1), Customs' decision is "presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such decision."[1] However, the CAFC has found that the pre-

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[1] 28 U.S.C. § 2639(a)(1) (1994).

sumption of correctness applies solely to factual questions and that this Court's duty is to find the correct result. The duty of the Court to find the correct result stems from both legislative and judicial sources. The CAFC recently found that "the trial court . . . must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative. . . . The court's duty is to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). The issues before the Court are the interpretation of the APF and HMT statutes which are questions of law and are reviewed *de novo*.

Both parties have moved for summary judgment. Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CIT R. 56. The Court finds that there is no genuine issue as to any material fact and therefore the Court has the power to render summary judgment.

Discussion

This case concerns two issues involved with the operation of cruise lines by Princess. The first issue concerns the application of APFs to two cruise routes operated by Princess. APFs attach to passengers that enter the U.S. from foreign ports. A number of foreign ports are exempted from APF liability and the controversy in this case focuses on the interpretation of the APF statute, specifically the meaning of "journey" and "arrival ... from." The task for the Court is to demarcate the scope of APF coverage of cruise passengers' arrival from certain ports.

Princess also contests the application of HMT fees to cruises that originate and terminate at HMT-exempted ports but make layovers at HMT-covered ports. At the center of this issue is the definition of "port use" as de-

scribed in the statute. The statute defines port use as the "loading or unloading" of cargo. The question for the Court is whether cruise passengers are subject to the HMT when they are "loaded" onto a cruise ship.

I. Application of APFs

The arriving passenger fee was a part of the Consolidated Omnibus Budget Reconciliation Act of 1986. The APF was codified at 19 U.S.C. § 58c as follows:

§ 58c. Fees for certain customs services

(a) Schedule of fees

(5) For the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside of the United States (other than a place referred to in subsection (b)(1)(A) of this section), $ 5.

19 U.S.C. § 58c(a)(5) (1988). Subsection (b)(1)(A) lists those ports that are exempted from APF liability.

§ 58c(b) Limitation on fees

(1) No fee may be charged under subsection (a) of this section for customs services provided in connection with --

(A) the arrival of any passenger whose journey --

(i) originated in --

(I) Canada,

(II) Mexico,

(III) a territory or possession of the United States, or

(IV) any adjacent island (within the meaning of section 1101(b)(5) of title 8, or

(ii) originated in the United States and was limited to --

(I) Canada,

(II) Mexico,

(III) territories and possessions of the United States, and

(IV) such adjacent islands; . . .

19 U.S.C. § 58c (b)(1)(A) (1988). Princess contends that the statute directs Customs not to collect the APF when: (1) "passengers whose last stop prior to arrival into the United States was a place listed in subsection (b)(1)(A) . . . ;" or when (2) "passengers whose cruise 'originated in' one of these places listed in subsection (b)(1)(A), . . ." Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") at 15. Customs disputes Princess' reading of the statute and argues that the statute directs them to consider "all stages of an itinerary" which would include the port of embarkation, all layover stops and the port of disembarkation. Def.'s Opp'n to Pl.'s Mot. for Summ. J. and Cross-Mot. For Summ. J. ("Def.'s Mot.") at 27.

The Court finds that the term "journey" as found in the APF statute refers to the travel from origination to termination of the cruise. Therefore, any cruise that originates in an APF-covered port and terminates in the United States will be subject to the assessment of the APF. Likewise, any cruise that originates in an APF-exempt port, such as Acapulco or Puerto Rico, and terminates in the United States or an APF-exempt port does not trigger the APF. Further, the Court finds that layover stops do not affect the administration of the APF statute; simply stopping at an APF-exempt port as the last port of call does not exempt cruise passengers from APF liability. Similarly, layover stops at APF-covered ports do not, in and of themselves, trigger APF liability. A cruise is a single journey, and origination and termination ports are to be the only sites which occasion the imposition of APF liability.

Under this rubric, Princess' Transcanal cruise is exempt from APFs since the origination and termination ports of Acapulco and Puerto Rico are specifically designated as exempt ports in subsection (b)(1)(A). Simi-

larly, Princess' Vancouver/Whittier cruise is exempt from APF liability because both origination and termination ports are APF-exempt ports under the statute. In Princess' Transcanal and Vancouver/Whittier cruises, passengers either begin their journey in the United States or a specified exempt port. Although Customs argues that the entire itinerary must be considered, the Court finds that passengers board a cruise for the duration of the journey and when that journey begins and ends in an exempt port, APF attaches.

II. Application of HMT Fees

Both parties have developed rationales on the application of HMT fees and the corresponding value of transportation services entailed. The Court finds that the HMT fees are unconstitutional with respect to transportation services provided to cruise passengers just as the tax on exported cargo was found to be in *U.S. Shoe*. Consequently, the Court does not reach the issues of HMT applicability on exempt and non-exempt ports nor the computation of the value of transportation services.

In 1987, the HMT took effect with the avowed purpose of helping to finance the general maintenance of U.S. ports and specifically the dredging of U.S. ports. S. Rep. No. 99-126, at 9 (1986), *reprinted* in 1986 U.S.C.C.A.N. 6639, 6646-47. The HMT was codified at 26 U.S.C. § 4461 and states: "General Rule ... There is hereby imposed a tax on any port use." 26 U.S.C. § 4461(a) (1988). The statute defines "port use" as "(A) the loading of commercial cargo on, or (B) the unloading of commercial cargo from, a commercial vessel at port." 26 U.S.C. § 4462(a)(1) (1988). The term "commercial cargo" is defined as "any cargo transported on a commercial vessel, *including passengers* transported for compensation or hire." 26 U.S.C. § 4462(a)(3)(A) (1988) (emphasis added). In addition, Customs' regulations base the tax assessed on passengers "upon the value of the actual charge for transportation paid by the passenger or on the prevailing charge for comparable

service if no actual charge is paid." 19 C.F.R. § 24.24(4)(i) ("transportation services").

Resolution of this issue turns on the holding in *U.S. Shoe*, where the Supreme Court confirmed that levying a tax on the value of commercial cargo loaded for export violated the Export Clause of the Constitution, U.S. Const., Art I, § 9, cl. 5. 140 L. Ed. 2d 453, 118 S. Ct. 1290. The statute has equated passengers with cargo, and *U.S. Shoe* has held that taxing exports, or "loading," of cargo violates the Constitution. *Id.* Therefore, the "loading" of passengers must also violate the Constitution, even though passengers cannot be said to be "exported." The Court finds the solution in the common meaning of the term embark which is, together with Customs' regulations and findings, synonymous with the term loading. Webster's defines "embark" to mean "to go on board a vessel or a boat for a voyage; as, the troops *embarked* for Lisbon." Webster's New International Dictionary 2nd Edition, at 835 (1956) (emphasis in original).

Under 19 C.F.R. § 4.80a, Customs defines "embark" to mean

> a passenger boarding a vessel for the duration of a specific voyage and *disembark* means a passenger leaving a vessel at the conclusion of a specific voyage. The terms *embark* and *disembark* are not applicable to a passenger going ashore temporarily at a coastwise port who reboards the vessel and departs with it on sailing from the port.

19 C.F.R. § 4.80a(a)(4) (1989) (emphasis in original). Although Customs' definition appears in an unrelated section of its regulations, the Court finds that this definition comports with the common meaning of the terms embark and disembark as well as load and unload with respect to passengers. The Court finds that embark, board and load all refer to the initial activity of passen-

ger movement from port onto the vessel. In congruence with the statute equating cargo to passengers and the ruling in *U.S. Shoe* voiding the HMT on the loading of cargo, the Court finds that the HMT with respect to passengers also runs afoul of the Export Clause of the Constitution.

Conclusion

For the foregoing reasons, the Court finds that cruise passengers whose journey originates and terminates at APF-exempt ports are exempt from APFs. The Court also finds that cruise passengers are not subject to HMT liability.

R. KENTON MUSGRAVE

SENIOR JUDGE

Dated: June 9, 1998

New York, New York

JUDGMENT

Upon consideration of plaintiffs' motion for summary judgment, defendant's opposition and cross-motion for summary judgment, oral argument and all other papers and proceedings, it is hereby

ORDERED that the plaintiffs' motion is granted in part and defendant's cross-motion is denied; and it is further

ORDERED that the arriving passenger fee provided in 19 U.S.C. § 58c is not due for passengers on cruises that begin and end at a port that is not a designated APF port, even if the cruise makes an interim layover stop at a designated APF port; and it is further

ORDERED that the Harbor Maintenance Tax provided in 26 U.S.C. § 4461 is unconstitutional as to taxes charged based upon the embarkation of cruise passengers, in accordance with the statute, which equates pas-

sengers with cargo, and in accordance with *U.S. Shoe*, cited and discussed *supra*; and it is further

ORDERED that defendant shall refund all harbor maintenance tax fees covered under this opinion, with interest.

R. KENTON MUSGRAVE

SENIOR JUDGE

Dated: June 9, 1998

New York, New York

Supreme Court, U.S.
FILED
JUN - 2 2000
CLERK

Nos. 99-1596 and 99-1600

In the Supreme Court of the United States

CARNIVAL CRUISE LINES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PRINCESS CRUISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the harbor maintenance tax imposed by 26 U.S.C. 4461 continues in force as applied to imports, domestic trade, and the carriage of passengers, notwithstanding this Court's holding in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 370 (1998), that the tax violated the Export Clause "as applied to exports."

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In the Supreme Court of the United States

No. 99-1596

CARNIVAL CRUISE LINES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 99-1600

PRINCESS CRUISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 99-1596 (Pet. App. 1a-16a)[1] is reported at 200 F.3d 1361, and its opinion in No. 99-1600 (99-1600 Pet. App. 1a-21a) is reported at 201 F.3d 1352. The opinions of the Court of International Trade in No. 99-1596 (Pet. App. 17a-23a, 24a-39a) are reported at 8 F. Supp. 2d 877 and 929 F.

[1] Unless otherwise noted, references are to the petition and the petition appendix in No. 99-1596.

Supp. 1570, and its opinion in No. 99-1600 (99-1600 Pet. App. 22a-31a) is reported at 15 F. Supp. 2d 801.

JURISDICTION

The judgments of the court of appeals were entered on January 5, 2000. The petition for a writ of certiorari in No. 99-1596 was filed on April 3, 2000, and the petition in No. 99-1600 was filed on April 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Water Resources Development Act of 1986 (WRDA), Pub. L. No. 99-662, 100 Stat. 4082, is a comprehensive statute designed to improve the nation's ports and harbors. Title XIV of the WRDA comprises the Harbor Maintenance Revenue Act of 1986, 26 U.S.C. 4461 *et seq.*, which imposes an *ad valorem* tax on port use by commercial importers, exporters, domestic shippers, and passenger liners (the harbor tax or HMT) in order to help fund the WRDA's harbor improvement programs. The harbor tax is imposed on "any port use," and is to be paid by the "importer," "exporter," or "shipper" on the basis of the value of the "commercial cargo" imported, exported, or shipped. 26 U.S.C. 4461(a)-(c). "Commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. 4462(a)(3)(A). Revenue from the tax is placed in a Harbor Maintenance Trust Fund, from which funds are drawn to improve the Nation's ports and harbors. 26 U.S.C. 9505 (1994 & Supp. IV 1998).

In *United States* v. *United States Shoe Corporation*, 523 U.S. 360, 363, 370 (1998), this Court held that the HMT is a "tax," rather than a "user fee," and therefore

"violates the Export Clause [U.S. Const. Art. I, § 9, Cl. 5] as applied to exports."

2. Petitioners operate commercial cruise ships. The United States Customs Service assesses the harbor tax on the value of all passenger travel that visits a port covered by the tax. See 26 U.S.C. 4462(a)(5)(B) (defining "value" of passenger transportation). Petitioners brought these suits in the United States Court of International Trade (CIT) challenging the Customs Service's manner of assessing the tax. Petitioners also claimed that if the HMT is unconstitutional as applied to exported goods, then it cannot be applied to passenger travel either, because the two applications are not "severable." Pet. App. 18a-19a.

In its first opinion in No. 99-1596 (Pet. App. 24a-39a), the CIT held that "the invalid export provisions of the HMT are severable from the valid portions" (*id.* at 39a). In its second opinion (*id.* at 17a-23a), issued after this Court's decision in *United States Shoe*, the CIT concluded that because "levying a tax on the value of commercial cargo loaded for export" violates the Export Clause, because the statute imposing the HMT "equate[s] passengers with cargo," and because the term "embark" (used of passengers) "is * * * synonymous with the term loading," it must follow that under "the ruling in *U.S. Shoe* voiding the HMT on the loading of cargo, * * * the HMT with respect to passengers runs afoul of the Export Clause of the Constitution." Pet. App. 22a- 23a. The court reached the same conclusion with respect to constitutionality in No. 99-1600. 99-1600 Pet. App. 28a-30a.

3. The court of appeals reversed in both cases. Pet. App. 1a-16a; 99-1600 Pet. App. 1a-21a.[2] The court rejected (Pet. App. 10a-16a) petitioners' argument, in support of the CIT's judgment, that the harbor tax cannot be imposed on the value of passenger transportation because that application cannot be severed from the tax's unconstitutional application to exported goods.[3]

The court first observed (Pet. App. 10a) that the WRDA "contains a broad severability clause." See 33 U.S.C. 2304.[4] Relying on this Court's decision in *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987), the court reasoned that the existence of such a clause "creates a presumption" in favor of severance, although a court must still consider whether the statute thus "created" is "legislation that Congress would not have enacted." Pet. App. 11a (quoting *Alaska Airlines*, 480 U.S. at 685, 687).

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[2] The court's opinion in No. 99-1600 incorporates by reference its discussion of the constitutional issue in No. 99-1596. 99-1600 Pet. App. 10a-11a. After ruling that the HMT is constitutional as applied to carriage of passengers, the court in No. 99-1600 also held that the tax is properly assessed when a ship stops in a covered port, even if the cruise begins from and ends in non-covered ports, and that petitioner Princess is responsible for a separate "arriving passenger fee" with respect to certain passengers. *Id.* at 11a-20a. Petitioner Princess does not challenge either of the latter holdings in this Court.

[3] Petitioners have not attempted to defend the CIT's reasoning, either before the court of appeals (Pet. App. 7a) or in this Court (Pet. 6 n.2).

[4] The court ruled that the severability clause applies to the provisions of the WRDA that enacted the HMT, just as it does to other provisions of the WRDA. Pet. App. 14a-15a.

The court found no sufficient reason to conclude that Congress "would not have enacted the remainder of the Harbor Tax had it known that the application of the tax to exports would be invalid." Pet. App. 12a. Noting that Congress chose to create the tax even though it was aware that application to exports might be unconstitutional, the court observed that the tax can continue to "function effectively and serve [its] purpose" of funding port and harbor improvements under the WRDA "even after the invalid application has been excised." *Ibid.*

As a textual matter, the court rejected (Pet. App. 12a-13a) petitioners' argument that because Congress did not enact a separate tax applicable only to "exports," there is nothing that can be "severed" from the statute, and the tax imposed on "any port use" may only be stricken in its entirety, even as applied to "cargo" other than exports. The general language imposing the tax, the court pointed out, "must be read in conjunction with the other statutory provisions," including those specifying when and by whom the unconstitutional tax on exports was to have been paid, which could be excised without affecting other applications of the tax. *Ibid.*

The court likewise found nothing in the legislative history to persuade it that Congress "would not have imposed the Harbor Tax without applying it to exports." Pet. App. 13a. Although Congress chose to impose a value-based rather than volume-based tax, it did so in order to avoid "disproportionately burden[ing] bulk commodities," which accounted for a substantial portion of both export and domestic shipping; and Congress's "'overriding intention' in enacting the tax was to provide revenue to fund port and harbor maintenance and improvement projects," not to "insur[e] that

exports properly contributed their fair share of the tax." *Id.* at 13a-14a. Moreover, although the history did reflect some concern that taxing imports but not exports could lead to conflicts with the United States' trading partners, the court noted that concerns about the effect of judicial rulings invalidating one application of the tax but not the other were "speculative and conjectural," and could be addressed by the Executive and Legislative Branches should the need arise. *Id.* at 15a-16a.

ARGUMENT

1. As the court of appeals recognized (Pet. App. 11a), the question of severability is one of legislative intent: An unconstitutional provision of a statute "must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). Petitioners argue (Pet. 10-17) that the Federal Circuit misapplied that test in this case, because "Congress would not have enacted" a tax that applies, as the HMT does after *United States Shoe*, to "imports, coastwise trade, and passenger cruises, but not [to] exports." Pet. 10. The court below, however, properly reached the contrary conclusion, and its determination does not warrant review by this Court.

a. The plain language of the WRDA, which enacted the harbor tax, supports the court of appeals' determination. The Act specifically provides that:

> If any provision of this Act, *or the application of any provision of this Act to any person or circumstance*, is held invalid, *the application of such*

> *provision to other persons or circumstances*, and the remainder of this Act, shall not be affected thereby.

33 U.S.C. 2304 (emphasis added).[5] Although such provisions may not always be dispositive with respect to particular severability questions, see Pet. App. 10a-11a, they provide a strong indication of the relevant legislative intent, and indeed "create[] a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686. That presumption may be overcome only by "strong evidence" to the contrary. *Ibid.*

Petitioners argue that because 26 U.S.C. 4461(a) states a "general rule" imposing a tax on "any port use," while the use of ports to export goods cannot be taxed under *United States Shoe*, there is in this case "no provision to sever." 99-1600 Pet. 8; Pet. 11, 19 n.11. They contend that the court of appeals should therefore have invalidated the HMT in its entirety, rather than "re-draft[ing] the law" by holding that it continues to apply in cases that do not involve exports. 99-1600 Pet. 8.

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[5] Citing *United States* v. *Locke*, 120 S. Ct. 1135, 1146 (2000), petitioners renew in passing their argument that the severability clause does not apply to the provisions of the HMT. See Pet. 6 n.3, 21 n.12. The court of appeals correctly rejected that contention. Pet. App. 14a-15a. The clause appears in Title IX of the WRDA, entitled "General Provisions," and its use of the term "this Act" naturally refers to the entire WRDA—of which Title XIV, enacting the HMT, is a part. There is nothing to suggest otherwise in *Locke*, which held only that Congress intended a specifically worded savings clause in one substantive title of a statute to have a correspondingly specific and limited scope. See 120 S. Ct. at 1144, 1146.

Contrary to petitioners' suggestion, the question whether an unconstitutional application of a statute should be "severed" from its constitutional applications is not fundamentally different from the question whether a discrete, unconstitutional provision should be severed from an otherwise constitutional Act. Both are ultimately questions of legislative intent. See Nagle, *Severability*, 72 N.C. L. Rev. 203, 208 & n.24 (1993); 2 N. Singer, *Sutherland Statutory Construction* §§ 44.02-44.03 (5th ed. 1993). This Court has held that statutes could not constitutionally be applied in certain situations, without striking them down in their entirety or suggesting any such result. See, *e.g.*, *United States* v. *Grace*, 461 U.S. 171, 178-184 & n.9 (1983); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504-507 (1985); *Wisconsin* v. *Yoder*, 406 U.S. 205, 207 n.2, 234-236 & n.22 (1972) (holding that certain aspects of state compulsory school-attendance law could not be applied to Amish parents, but expressly disclaiming (at 236) any intention to "undermine the general applicability" of those statutes); cf. *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 521 & n.26 (1981) (plurality opinion) (holding billboard ordinance unconstitutional to the extent it included prohibitions on non-commercial speech, but remanding to state court for determination whether ordinance should be "sustain[ed] * * * [in part] by limiting its reach to commercial speech").

The Court has, moreover, observed that a legislature may, through a severability clause, specifically "provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 460-461 (1992). That is exactly what Congress did in the WRDA, and the court of appeals was correct to honor that express legislative

direction. Compare 33 U.S.C. 2304, quoted above, with *Wyoming*, 502 U.S. at 461 n.14 (citing substantially identical severability provision involved in *INS* v. *Chadha*, 462 U.S. 919, 932 (1983)), and *Brockett*, 472 U.S. at 506-507 n.14 (relying in part on similar severability provision in holding that there was "no obstacle to partial invalidation" of statute).

In any event, as the court of appeals pointed out, petitioners err in seeking "to read the '[g]eneral rule' provision" in Section 4461(a) "in isolation from the remainder of the statute," rather than "in conjunction with the other statutory provisions, which explain and describe its operation." Pet. App. 13a. Section 4461(a) imposes a tax on "port use," and subsection (b) prescribes the base and rate of tax. Subsections (c) and (d) then specify who must pay the tax, and when. Those subsections differentiate expressly among exporters and others, and between exports and all other sorts of cargo. 26 U.S.C. 4461(c)(1)(B) and (c)(2)(A); see Pet. App. 2a-3a, 42a (setting out provisions). The provisions referring to exports and exporters may be straightforwardly "severe[d]" from the remainder of Section 4461, and they leave a statute that designates how the HMT is to be figured (on the value of cargo), who is to pay it (importers and shippers), and when it is to be paid (at the time of unloading). This is not, accordingly, a case in which the statute in question "nowhere sets up" the appropriate line for severance, Pet. 11 (quoting *Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973)), but rather one in which "the text * * * identifie[s] a clear line" that the courts may draw. *Reno* v. *ACLU*, 521 U.S. 844, 884 (1997) (citing *Brockett* and *Grace*).[6]

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[6] Petitioners labor unsuccessfully (Pet. 18-24) to demonstrate some sort of conflict between this Court's decisions in *Reno* and

b. Relying on legislative history and the foreign-policy sensitivity of questions involving international trade, petitioners argue (Pet. 11-17) that Congress would not have enacted the HMT if it could not be applied to exports, as well as to imports, passenger transportation, and domestic cargo. As the court of appeals reasoned (Pet. App. 12a), however, the HMT was enacted "to raise money to help fund the port and harbor improvements" envisioned by the WRDA.[7] The tax "continue[s] to perform that function, although on a lesser scale," even though it may not be applied to exports. *Ibid.*

Obviously, Congress would have *preferred* for the tax to apply to exports as well. Any inquiry into severability is, from the affected legislature's point of view, an inquiry into what option is second-best. Here, the second-best solution is manifest. At the time it considered and passed the WRDA, Congress was aware that the Export Clause might bar application of the HMT to exports. Pet. App. 12a. It nonetheless enacted the tax, along with the severance clause discussed

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Alaska Airlines. *Reno* refused to preserve the possibility that there might be some constitutional applications of a ban on certain "indecent" speech, in part because the challenge before it was facial rather than "as applied," and in part because the "open-ended" statute in question provided "no guidance whatever for limiting its coverage." 521 U.S. at 883-884. Nothing in that analysis is inconsistent with *Alaska Airlines*—or, as the text demonstrates, with the court of appeals' decision in this case. See also *Mille Lacs*, 526 U.S. at 191 (restating traditional test).

[7] Enactment of the HMT to offset port and harbor maintenance costs was an essential element of the WRDA package. See H.R. Rep. No. 251, 99th Cong., 1st Sess. Pt. 4, at 42 (1985); S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985); 132 Cong. Rec. 4940 (1986) (statement of Sen. Stafford).

above.[8] As the court of appeals rightly concluded (*id.* at 13a-16a), nothing in the legislative history demonstrates that if Congress had known it could not impose the HMT on exports, it would instead have chosen to impose no tax at all.

Petitioners stress (Pet. 12) Congress's desire to impose a "uniform" tax. As we have noted, what Congress thought ideal is not the relevant inquiry, because the starting point here is that the Constitution has precluded that approach. In any event, as the court below recognized (Pet. App. 13a-14a), the concern with respect to "uniformity" was to avoid disadvantaging shippers of high-volume products such as coal in relation to shippers of high-value products such as computer chips—not to avoid disadvantaging importers, domestic shippers, or cruise lines in relation to exporters. See H.R. Rep. No. 251, 99th Cong., 1st Sess. Pt. 4, at 24-26 (1985). To the extent that Congress was troubled by the relative tax burdens on exports and imports, the concern was clearly to avoid overburdening *exports*, not to achieve equity for importers or passenger carriers. See Pet. 12-13 & n.7.

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[8] The House Merchant Marine and Fisheries Committee, on whose report petitioners rely (Pet. 12-14), recommended passage of a clause providing specifically that if the HMT were held "invalid in one or more of its applications," it should "remain[] in effect in all valid applications that are severable from the invalid applications." Pet. App. 14a (quoting H.R. Rep. No. 251, *supra*, at 13). "The concern of the Committee * * * was, for example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid and it [was] the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid." *Id.* at 30; see also *id.* at 34. Ultimately, Congress adopted one severability clause for the entire WRDA.

Nor does evidence in the legislative history concerning Congress's natural concern over relations with our trading partners, see Pet. 13-17, justify an inference that if Congress could not tax both exports and travel on cruise ships, it would have chosen to tax neither. The continued need for funding for ports and harbors, and the continued efficacy of the HMT in providing that funding even if it cannot be applied to exports, are clear and concrete. See, *e.g.*, U.S. Army Corps of Engineers, *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1998*, at 17 (Dec. 1999). By contrast, the merit and likely ultimate consequences of complaints by our trading partners, based on the invalidation of the HMT as applied to exports, are at best unclear even now. See Pet. App. 16a. At the time the WRDA was passed they would have been wholly speculative. Congress's possible awareness that invalidation of the HMT as applied to exports might lead to future trade disputes therefore provides no basis for refusing to enforce the tax to the extent that it is constitutional—particularly in light of Congress's specific directive in the severability clause.[9] In any event, if and when such disputes materialize, their resolution is a matter for the President and for Congress, which is fully capable of reconsidering the design and advisability of the HMT, in light of *United States Shoe*, if it wishes to do so.

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[9] Even when the pertinent issues are squarely raised, Congress does not always choose to avoid such disputes. Cf. 19 U.S.C. 2504(a) ("No provision of any trade agreement * * * nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.").

2. Petitioners suggest the existence of "conflicts and confusion * * * among the courts of appeals" on the proper approach to severance questions (Pet. 18), but the two cases they cite do not support that suggestion.

In *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998), the court applied the traditional severance test, asking whether Congress would have enacted the statute at issue "in the absence of one of its key provisions," which this Court had invalidated. The court suggested (without holding) that the statute might have to be invalidated in its entirety, because "[m]ost likely [the statute] would not have been enacted" without the invalid enforcement mechanism. See *id.* at 1301. The court noted, however, that the statute might remain enforceable, if under particular circumstances its operation would be "close enough to what Congress had in mind." *Ibid.*

In *Ackerley Communications of Massachusetts, Inc.* v. *City of Cambridge*, 135 F.3d 210, 215 (1st Cir. 1998), the court confronted a question of severability under Massachusetts law, which involved much the same sort of inquiry as the traditional federal test applied in *Spokane Tribe*: "[W]hether [the ordinance] would have been enacted had the City Council known that it would" apply only to signs conveying commercial, as opposed to non-commercial, messages. *Ibid.* Citing *Reno* for the proposition (undisputed here) that "[s]everability clauses, though probative of legislative intent, are not conclusive" (*id.* at 215-216; compare Pet. App. 10a-11a), the court refused to read a distinction between commercial and non-commercial speech into an ordinance no part of which "allude[d] in any way to [such] a substantive distinction." 135 F.3d at 216. Nothing in that decision conflicts with anything in *Spokane Tribe*,

and nothing in either case conflicts with the decision below. See pp. 9-11 & n.6, *supra*.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] There will, of course, never be any conflict on the precise question presented in this case, because challenges to the application of the HMT fall within the Federal Circuit's exclusive jurisdiction. See 28 U.S.C. 1295(a)(5), 1581(i); *United States Shoe*, 523 U.S. at 365-366.